# THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

PRICE DANIEL
ATTORNEY GENERAL

May 8, 1947

Mr. Maxwell Welch,
District Attorney,
5th Judicial District,
New Boston, Texas

Opinion No. V-192

Re: Legality of holding a minor accused of robbery until he reaches 17 years of age so that he may be tried as a felon rather than a juvenile delinquent.

Dear Sir:

Your letter of April 16, 1947, to this department states the following question:

> "May a boy who committed the offense of robbery with firearms at the age of sixteen years and eleven months, and who was arrested immediately after the offense occurred, be indicted and held until he reaches the age of seventeen and then be tried as an adult, or should he be tried as juvenile?"

You are advised that the trial of such youth may not be intentionally delayed for the sole purpose of allowing him to reach his 17th birthdate. Art. 1, Section 10 of the Texas Constitution, and Art. 3, C.C.P. provide:

> "In all criminal prosecutions the accused shall have a speedy public trial . . . ."

This same right is guaranteed by the 6th Amendment of the Federal Constitution. While proceedings under the Juvenile Act (Art. 2338-1) are not strictly criminal in nature, it is believed that the accused, under such act, (who may be deprived of his liberty until he is 21 years of age), is entitled to the protection afforded by such provision. To postpone the trial of the accused for the above arbitrary reason would be to deny him the inalienable right above guaranteed. If the trial could purposely be postponed a month, as in the case under consideration, it would be extremely difficult to draw a line in other cases where it might be thought de-

sirable to postpone the trial of other youths for 6 months, a year, or longer, until they should become 17 years of age. Such a course of action could not be justified under our Constitutions.

This principle is recognized by the Court of Criminal Appeals. In Watson v. State, 237 S. W. 298, the accused lacked one or two months of being 17 when the offense was committed. After he became 17, he was tried as a felon. The contention was made that his trial had been intentionally delayed until he became 17. The Appellate Court said that it found no evidence to support such contention and overruled it. It stated, however:

> "We would be unwilling to give our approval to a course of delay for the sole purpose of depriving an accused of his privilege under the juvenile law. . ."

In Walker v. State, (Tex. Crim.) 45 S.W. (2d) 987, the issue was raised for the first time on motion for rehearing that the trial of the minor had been intentionally delayed until he reached 17. It was held that there was no evidence to sustain such contention, and that the point was raised too late. The Court of Criminal Appeals, nevertheless, took occasion to repeat the above quoted principle.

It must be stated, however, that it is the uniform Texas rule that the age of the youth at the time of trial, (and not his age at the time of the commission of the offense), which is controlling with reference to whether he should be tried as a felon or a delinquent. Hardie v. State, (Tex. Crim.) 144 S. W. (2d) 571; Conley v. State, (Tex. Crim.) 116 S.W. 804; Stallings v. State, (Tex. Crim.) 87 S. W. (2d) 255; Denny v. Wilson, (Tex. Sup.) 179 S. W. (2d) 269, 275.

Section 13 of Art. 2338-1, passed in 1943, follows the above rule by stating that a youth, on trial as a felon in a criminal court, should be delivered to the Juvenile Court, if it should be ascertained that the male youth was "under the age of seventeen (17) years at the time of the trial . . ." (Emphasis ours)

Where, in the normal course of the disposing of the criminal docket, the accused becomes 17 years of age before trial, though he was 16 at the time of the

offense, he is held to be properly triable as a felon. In Hardie v. State, (Tex. Crim.) 144 S. W. (2d) 571, an offense was committed by a 16 year old boy on April 28th. His mother appeared on May 6th and disclosed that the boy would not be 17 years old until May 9th, all of the same year. She requested that the child be tried immediately as a delinquent child. The county attorney told the mother that he intended to present the matter to the Grand Jury on May 10th; and he followed such course of action. On appeal, the contention was made that it was obligatory for the county attorney to proceed immediately against the minor as a delinquent, and that he was not justified in holding the matter until the Grand Jury should act. The Court of Criminal Appeals held:

> "The law contemplates as controlling in such matters the age of the accused at the time of the trial, not his age at the time of the offense, and we do not think that the county attorney's refusal to rush into an immediate trial within less than three days evidences an unfair attitude upon his part. In the case of McLaren v. State, 85 Tex. Cr. R. 31, 209 S. W. 669, the appellant had been first tried for the murder of his father while he was only sixteen years of age which first case was reversed by this court on that ground, the court holding that he should have been proceeded against as a juvenile. . . Upon the reversal of this case the accused had reached the age of seventeen years, and he was again put upon his trial for murder. . . and although the offense was charged to have been committed on a date which showed the accused was under the age of seventeen years, nevertheless it was held that the age of the accused at the time of the trial and not at the time of the commission of the offense was that which governed in regard to his juvenility. . . We have no doubt of the correctness of this doctrine, and this bill is overruled." (Emphasis ours)

And in Smith v. State, (Tex. Crim.) 266 S.W. 153, the accused was indicted on April 5. On April 15, the last day of a special term of court, he filed an affidavit that he was 16 years of age, and would not be 17

until May 23, the month following. The matter was set for a hearing on April 21st, at which time the court sustained the motion of the State to continue the matter to the next term of court, to begin May 28, (five days after the accused's 17th birthday), because the district attorney had not had an adequate opportunity to prepare his proof on the youth's age. When the case was tried, the accused admitted that he had become, and was, 17 years of age. Upon appeal, it was held that, there being no showing of bad faith on the part of the district attorney, and a showing that the youth's affidavit was filed on the last day of the term, the accused was properly tried as a felon, since he was 17 at the time of trial.

In a decision handed down by the Court of Criminal Appeals April 30, 1947, Dearing v. State, (not yet reported), a 16 year old boy robbed and killed a farmer's wife on July 14, 1945. On July 20th following, the county attorney filed charges against him as a delinquent child because of a former robbery; and the boy was sent to the Gatesville School until he should become 21. In May of 1946, after the boy became 17, he was indicted for the above murder, returned from Gatesville, tried as a felon, and given a 99 year sentence. Following the cases herein set out, the Court of Criminal Appeals affirmed the judgment, holding the boy properly triable as a felon after reaching 17. The opinion, a copy of which is enclosed, reads in part:

> "To hold that a male child who committed an offense two days, two weeks, or two months prior to the time that he became 17 years of age could not be prosecuted for said offense after he reaches his 17th year would be creating a haven or refuge for the criminally inclined. . . Orderly society is entitled to protection as well as a delinquent child."

## SUMMARY

The trial of a youth 16 years and 11 months of age cannot be intentionally delayed until he becomes 17 years of age for the sole purpose of trying him as a felon rather than a delinquent. Art. 1, Sec. 10, Texas Constitution. Where, however, in the normal course of events, the youth reaches

the age of 17 before trial, he is properly triable as a felon. One who commits a felony while under 17, may be indicted and tried after reaching the age of 17. (Dearing v. State, Tex. Crim. App., opinion of April 30, 1947, not yet reported.)

Yours very truly,

ATTORNEY GENERAL OF TEXAS

By Joe R. Greenhill

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Assistant

JRG:wb

APPROVED MAY 9, 1947

Price Daniel

ATTORNEY GENERAL OF TEXAS